NO. 2649

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

S. H. MILWEE and W. W. BALDWIN,
Plaintiffs inError.

vs.

WM. N. C. WADDLETON,
Defendant in Error.

Answer Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

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STATEMENT

It is alleged in the Complaint in this case that plaintiff was in the actual, exclusive, sole notorious, continuous, uninterrupted, hostile, open and adverse possession under a claim of ownership, and was the owner and entitled to possession of a certain lot, parcel or piece of land described as Lot 6 in Block 13 of the City of Juneau, and that the defendants unlawfully entered into the possession of said lot, or a greater portion thereof, and ousted and ejected the plaintiff therefrom, and were unlawfully and wrongfully withholding the possession from said plaintiff. (P. R. 1-2.)

The Answer denies all the allegations contained in the Complaint, except as to the possession of the plaintiff, and sets up an affirmative defense in which it is alleged that the defendant, S. H. Millwee is the owner in fee simple and entitled to the possession of the lot described in the Complaint, and that the defendant, Baldwin, is in possession as tenant of Millwee, but that Baldwin has no other interest therein. (P. R. 4-5.)

In the Amended Reply plaintiff denies each and every allegation contained in the affirmative defense of the Answer, except that the defendant Baldwin has no interest in the lot described in the Complaint.

And further replying to the Answer, the plaintiff pleads the Statute of Limitations by reason of his actual, exclusive, sole, notorious, continuous, uninterrupted, hostile, open and adverse possession of said Lot 6 in Block 13 of the City of Juneau for more than ten years immediately preceding the time when he was ousted from a portion of said Lot 6 in Block 13 as alleged in the Complaint, and more than ten years immediately preceding the commencement of this action, and more than ten years immediately preceding the filing of defendant's Answer and affirmative defense and Cross Complaint. (P. R. 6-7.)

The case was tried before a jury. From the transcript of record it appears that the attorney for defendants, Millwee and Baldwin, at the conclusion of the evidence, moved the court to direct the jury to return a verdict for defendants on the following grounds, to-wit:

I.

Plaintiff has failed to produce any evidence which should support a verdict for him.

II.

Plaintiff has failed to produce in evidence any deed or other muniment of title to the premises in controversy, but relies solely upon the ten years' statute of limitation and the evidence fails to show that the plaintiff took or held any possession of the property adversely to the owner under an honest bona-fide belief or claim of ownership, but such pos-

session as plaintiff had was at all times subordinate to the true title; and the evidence further fails to show that the possession of the plaintiff was exclusive and actual as to any defined portion of said premises and is therefore insufficient to support a verdict for anything in plaintiff's favor.

The foregoing motion was denied and overruled: (P. R. 45.)

The Court thereupon instructed the jury to return a verdict for the plaintiff, Waddleton, for an undivided two-thirds interest of the lot in controversy. (P. R. 45-46.)

As to the remaining one-third the court submitted the same to the jury under instructions. (P. R. 46.)

Thereupon the jury returned the following verdict:

> "We, the jury in the above entitled cause, find for the plaintiff that he is entitled to the possession of the property described in the complaint, and that he is the sole owner thereof as against the defendants."

The following are extracts from the testimony of the plaintiff, Waddleton:

> "I have lived continuously on Lot 6, Block 13, Juneau, for the last 18 years." (P. R. 10.)
>
> "I have lived continuously from the Spring of 1896 until now in that cabin." (P. R. 11.)
>
> "In 1896 I occupied the lot alone and claimed the ownership to it at that time. This contest

(in the Land Office) was in November, 1898. The Pullen heirs, through John G. Heid contested for it and Lyons (townsite trustee) refused to acknowledge my claim and gave the deed to the Pullen heirs * * * during the year 1898. I was still in possession of the lot, and in 1901 or 1912 Thomas R. Lyons told me that the Department at Washington had decided against me on the appeal." (P. R. 11.)

"I have been living on that same lot ever since the issuance of the patent and am still living on the lot and the only time anyone has attempted to dispossess me or disturb me in any way at all was on the 12th day of June, 1914." (P. R. 11-12.)

"I have occupied the lot and paid the taxes on it all the time and claimed it." (P. R. 12.)

"I knew the Pullen heirs claimed this lot and I knew that the townsite trustee had decided it in their favor and gave them a deed for it as against me and I was notified by Judge Lyons that the Department at Washington had decided against me when the contest was appealed. I remained in possession of the lot and claimed it after that because I thought I had a better right; the Pullen heirs had not been heard from and I did not think they could get it." (P. R. 13.)

"No claim whatsoever had been made by any of the Pullen heirs to the land in controversy and

it formed no part of the inventoried Pullen estate and had never been occupied by any of the Pullen heirs." (P. R. 13.)

"I claimed the lot for my own. I have been in the adverse, open, notorious and exclusive possession of that lot ever since I went on it until the 12th day of June, 1914 this year." (P. R. 15-16.)

The following are extracts from the testimony of L. A. Moore:

"I have resided in Juneau, Alaska since the 22nd day of July, 1895, and have lived during that time on the third lot above the Elks Hall (near lot in controversy) (P. R. 18.)

"I know that for a good many years Waddleton has claimed that he owned the lot he is on; I think it has been for about fifteen years he has claimed to own it. I saw him building a stone wall along in front of the lot down in below the cabin, about a foot or a foot and one-half high, and along next to the street; he built that wall several years ago but I do not remember the exact time." (P. R. 18.)

The following are extracts from the testimony of Patrick Evoy:

"I have lived next to Waddleton for all the years since 1898; Waddleton was on the place where he now lives in 1898 and has ever since been there. Waddleton built a stone wall along in front of the lot and about 25 feet long, below

his cabin, about six or eight years ago; and I saw him build a sewer there from the back end of his cabin down across the lot about the same time that he built the stone wall in front. That sewer was built down across the lot back about 25 feet from the street in front and was connected with the city sewer." (P. R. 19.)

The following are extracts from the testimony of E. R. Jaeger:

"I know that Mr. Waddleton has lived on the same lot where he now lives—to the best of my knowledge he has lived on that lot—I would consider that it has been his own since 1895. I moved into the property where I now live in 1899 and Waddleton was living on the property then where he now lives. I do not know whether Waddleton has claimed to own it or not but I do know, I learned rather , that early about the time that I left the present site of the Elks Hall in 1898 or 1899 and I know that there was an adverse claim and what disposition was made of it I do not know but Waddleton remained in possession and I presumed that the claim was settled in Waddleton's favor. Waddleton has claimed the property because at the time we built the building occupied by the Cain Hotel we had occasion to use certain portions of the property in order to get our material on the ground and I spoke to him about using a corner of the lot." (P. R. 20.)

The following are extracts from the testimony of George Harkrader:

"I have been in Alaska since January, 1874 and have lived in Juneau for the last 33 years. I know Wm. N. C. Waddleton and know where he lives. I met him by his house in 1896 * * *. He told me at that time that he owned the lot—in 1896." (P. R. 21.)

The following are extracts from the testimony of Henry Embola:

"I have known Mr. Waddleton for 15 or 16 years. He told me first about 10 years ago that the house and lot belonged to him." (P. R. 21-22.)

The following are extracts from the testimony of John Reck:..

"I have known him (Waddleton) for at least 14 years, maybe 15 years * * *. He has always claimed to own that lot—it must be nearly 10 years since he has claimed to own that lot—about 1900 or 1902 or 1901; and the assessments of taxes for the city, he claimed the lot and said something about paying the taxes for the lot. Waddleton has often protested against the high assessments on his lot. I know personally that he was paying taxes on his lot." (P. R. 22.)

(Note—Mr. John Reck was one of the councilmen for the City of Juneau, which fact he testified to but it does not appear in the narrative form of his testimony.)

The following are extracts from the testimony of Enoch Johnson:

> "I knew of Mr. Waddleton living in the same place where he now lives 16 or 17 years ago; As far as I remember he has always lived there. He claims that he owns that lot—he first told me that about 16 years ago, I guess." (P. R. 23.)

The only testimony introduced by the plaintiff in error is the evidence of Mr. John G. Heid, an attorney at law. He testified that there was a contest between Waddleton and the Pullen heirs concerning the property in controversy before the townsite trustee somewhere in the year 1898, and that deed was awarded to the Pullen heirs and Waddleton appealed to the Land Office at Washington and it was there decided, in 1902, against him and in favor of the Pullen heirs. (P. R. 32.)

He further testified that Waddleton, the defendant in error, continued to remain on the property; that "I told Waddleton then that he could stay on the lot but he must pay something, must do something, and that he must pay the taxes at least, and he agreed to pay the taxes." (P. R. 33.)

He further testified, "At that time property in Juneau was not worth much, and I could not find the Pullen heirs and hence let the matter go." (P. R. 33.)

Again, on Cross-Examination, he testified, "I knew the man was on this lot all the time, and I did not try to get him off except as I have said. I never

instituted any suit to eject him." (P. R. 34.) "I did not know that he was going to claim the lot until years after that; in fact, I did not think he could." (P. R. 34-35.)

"I have never seen but one of the Pullen heirs, and this particular heir, J. H. Pullen, came to Juneau more than twenty years ago and expected to find quite an estate belonging to the Pullen heirs and was disappointed, *and when shown this particular lot abandoned it and gave it up in disgust, and I have never received a letter or any word from him since that time, and I have never seen or heard at any time from any of the other heirs; I do not know whether any of the heirs are living or dead; I never received any power of attorney from any of the Pullen heirs, excepting J. H. Pullen, which was prior to the said J. H. Pullen's coming to Juneau, and over twenty years ago; I have never communicated anything to J. H. Pullen for a great many years, or since the said J. H. Pullen was in Juneau, as aforesaid, concerning said lot. I have not heard from any of the Pullens or the Wilsons for a number of years—probably ten or more years; and I do not now know where they are.*"

(P. R. 35-36.)

The defendant in error, on rebuttal, testified:

"It is not true that I promised to pay the taxes if he would let me stay in the house; he (Heid) never told me to pay the taxes for him.

I paid the taxes always for myself and because I claimed the lot for myself; and I always objected to the receipt and assessment being made out to the Pullen heirs, John G. Heid, agent." (P. R. 43.)

ARGUMENT

The Defendant in Error was plaintiff below, and in this argument we will refer to him as plaintiff and to the plaintiff in error as the defendant.

From the evidence, extracts of which are given under the foregoing statement of the case, the following facts are fully established, Viz:

First,—That the plaintiff went into possession of the lot in controversy in the Spring of 1896, claiming to own the same, and from that time up to June 12, 1914, when the defendant ousted him from a portion of said lot, *plaintiff held the exclusive possession thereof.*

Second,—That a contest was had between the plaintiff and the Pullen heirs, under whom the defendant claims title, before the United States Land Department concerning said lot, and that as a result of this contest, a deed was given by the trustee of the townsite of Juneau to James H. Pullen, Mary H. Wilson and Thomas A. Wilson, which said deed was executed on the 10th day of November, 1898. (See deed P. R. 24.)

Third,—*That the plaintiff continued in possession after the execution of the trustee's deed, above*

mentioned, and no steps or legal proceedings were ever instituted to eject him from the premises.

Fourth,—That the testimony of the plaintiff is, that at all times ever since he went into possession of the lot in 1896 he has claimed to own the lot in controversy as his own, *and that his possession was adverse, open, notorious and exclusive* (P. R. 16). *and that he has claimed to own said lot for more than* 15 *years* is corroborated by other witnesses (P. R. 19, 20, 21, 22 and 23.) That the only testimony, which in any way attempts to contradict the evidence introduced on the part of the plaintiff, is the indefinite testimony of John G. Heid that in 1902 he told the plaintiff he must do something—and that he must pay the taxes at least.

Fifth,—That John G. Heid only represented one of the grantees named in the trustees deed, Viz: James H. Pullen, and according to Mr. Heid's own testimony, he, Pullen, more than 20 years ago, came to Juneau and when shown the lot in controversy "*abandoned it and gave it up in disgust*"; and this was subsequent to the execution of the Power of Attorney by the said James H. Pullen to the said John G. Heid, under which power of attorney, the said Heid purports to convey the lot in controversy to the defendant, Milwee, and the said Heid has not received any communication or word from the said Pullen since that time—over 20 years ago.

That so far as Mary H. Wilson and Thomas A. Wilson, the other two grantees in the trustee's deed

are concerned, they are not claiming to own said lot and Mr. Heid at no time ever communicated with them, or ever heard from them, and it is not known whether any of the parties are living or dead.

Sixth,—That the said trustee's deed conveys said lot in controversy to the said James H. Pullen, Mary H. Wilson and Thomas A. Wilson, and does not mention any specific interest to each party, but merely conveys the lot to them.

With the foregoing evidence before the jury, the defendant made a motion for a directed verdict, which motion is set forth in the brief of defendant on appeal, and appears on page 45 of the printed record.

Because the trial court refused to grant this motion, and instructed the jury to return a verdict for plaintiff for an undivided two thirds interest in the property in controversy, the defendant appeals.

The assignment of errors merely states that the court erred in refusing to grant said motion, and also erred in instructing the jury peremptorily, to return a verdict for plaintiff for an undivided two-thirds interest in the property.

Neither the motion nor the assignment of errors point out specifically, or at all, wherein the evidence was insufficient to support a verdict for the plaintiff. It states generally "that plaintiff has failed to produce any evidence which should support a verdict for him."

We believe, under the established rules as well as decisions of Appellate Courts, no error will be considered unless the same are clearly and specifically assigned, and errors not so assigned will be disregarded.

However, we can conceive of no case under the Statutes of any State of the Union where the evidence could be more convincing and less conflictive in support of an adverse possession than in this case. It included all the elements of an adverse claim. The lot in controversy was held by the plaintiff, under a claim of ownership, ever since he went upon the lot in 1896, and from that time up to June 12, 1914, when he was ousted from a portion thereof by the defendant, and immediately brought this action to protect his claim of adverse possession, he was in the actual, exclusive, sole, notorious, continuous, uninterrupted, hostile, open and adverse possession thereof, at all times claiming to own said lot.

At the time of the contest before the Land Department in 1898 to determine who should receive trustee's deed for said lot, plaintiff continued in possession, and although the decision of the Department rendered in November, 1898, was against him, he still continued in possession and appealed to the Land Office at Washington, and although the Land Office at Washington, in 1902, affirmed the decision of the townsite trustee, yet, nevertheless, the plaintiff did not surrender his possession but continued to hold and occupy said lot, without any break in the

continuity of his actual possession, until June 12, 1914, aforesaid, and *more than ten years* from 1902, the date of the affirmance by the Land Office at Washington of the decision of the townsite trustee.

Neither the decision of the townsite trustee nor of the Land Office at Washington were offered in evidence, and so far as the record shows, such decisions merely authorize or confirm the execution of turstee's deed dated November 10, 1898, conveying the lot to the said James H. Pullen, Mary H. Wilson and Thomas A. Wilson.

We contend:

(1). *That the possession of the lot in dispute by the plaintiff was continuously maintained from the Spring of the year* 1896, *and his adverse possession thereof, started at least from the date of the execution of the townsite trustee's deed to the Pullen heirs on November* 10, 1898, *and was thereafter continuously maintained up to June* 12, 1914, *without any break in the continuity of such adverse possession.*

> One who enters upon land supposing it to belong to the United States, in the expectation and with the intention of preempting it, and whose possession is actual, open, continuous, uninterrupted, visible, notorious, distinct and definite while the Statute of Limitations runs, holds in hostility and adverse to the holder of the record title, and to everybody else, except the United States.

Clemens v. Runcket, 84 *Am. Dec.* 69.

In the case at bar there was no judgment or decree of any court; there was merely a decision by the Land Department upon a contest between the plaintiff and the Pullen heirs which authorized or confirmed the execution of the townsite trustee's deed to them.

If, however, there had been a judgment,

> "The mere recovery of a judgment will not of itself stop the running of the statute of limitations. There must be an actual change of possession by virtue of such judgment, and where the plaintiff in ejectment neglects to enforce his judgment within the period laid in his demise, his right of entry under that judgment is altogether gone."
>
> 1 *CYC* 1019 (11)

No action in ejectment was brought by the Pullen heirs, or any one else to oust the plaintiff from his possession of said lot. He was left in the undisputed possession thereof notwithstanding he had shown that he was holding same in hostility to any title or claim of the Pullen heirs.

> Even had such a suit been brought and judgment obtained, such "judgment in ejectment, not followed by any writ nor by taking possession under it, does not suspend or interrupt the running of the statute of limitations."
>
> *Mabary vs. Dollarhide*, 98 *Mo.* 198.
>
> *Batterton vs. Chiles* 54 *Am. Dec.* 539.

A judgment to have such an effect, "must be from the date of the accrual of a right to dispossess by action the adverse possessor.

R. C. L. p. 725, Sec. 40.

As a general rule the statute of limitations will commence running in favor of an adverse possession from the date of the accrual of a right to dispossess by action the adverse possessor.

Grey et al vs. Given 26 Me. 291.

In the case of Iowa R. L. Co. v. Blumer, 206 U. S. on page 496, which bears a similarity to the case at bar, Mr. Justice Day stated, "And for more than ten years that company (Iowa R. L. Co.) was in possession under its grant that it might have maintained an action in ejectment and asserted its title to the premises as against Carruher" (adverse claimant). By reason of such failure, the statute of limitations, in the foregoing case, barred the right of recovery."

We submit in this case, however, there is no judgment, decree or decision to be considered at all as there is nothing of the kind in the record. In the case as presented, the defendant claimed title to the lot in controversy by virtue of a deed executed by Mr. Heid purporting to act as attorney in fact of James H. Pullen, Mary H. Wilson and Thomas A. Wilson, as hereinbefore mentioned, as against the adverse claim of plaintiff.

It is not contended that this deed conveys any other or greater interest than that of James H. Pullen, which could only be an undivided one-third.

Assuming, therefore, for the sake of argument only, that this deed does convey the undivided one-third interest of Pullen in the lot in controversy, what effect could this trustee's deed have upon the adverse possession of plaintiff since the Spring of 1898? The execution of the trustee's deed to Pullen, et al, did not suspend the operation of the Statute of Limitations. In fact, it may probably be questioned whether the statute really commenced to run until the execution of that deed in 1898.

But, from the time of the execution of that deed vesting the title to said lot in Pullen, et al., the adverse possession of plaintiff certainly became operative and in full blast. See Caflin v. Malone, 50 *Am. Dec.* 526.

This record title was the only means to defeat plaintiff acquiring title by adverse possession, and, yet, nothing was done by the grantees under that deed to oust the plaintiff from his well known adverse possession of said lot in controversy, and any right that the grantees under that deed might have had to oust the plaintiff from his possession had been allowed to slumber all these years notwithstanding it was well known by John G. Heid, agent, that the plaintiff had been, and then was, claiming ownership of the lot in controversy.

From the foregoing, we, therefore, submit that the failure of defendant or his pretended grantors to commence an action to recover possession of said lot under the record title in the Pullen heirs, is now

barred by the Statute of Limitations. Such suit must be brought within the period of the Statute of Limitations, otherwise it is too late.

Hopkins Heirs vs. Calloway, 47 *Tenn.* 37. *I R C. L.* 689.

As the adverse occupant acquires a good title in fee it necessarily follows that possession for the statutory period will bar an action of ejectment by the owner of the paper title.

1 *CYC.* 1137 (11) *citing numerous authorities.*

The Statute of limitations establishes a preemptory and inflexible rule of law which terminates the rights of the legal owner and protects the disseisor in his possession, not out of regard to the merits of the latter's title, but because the real owner has acquiesced in a possession which was adverse for such a length of time that the statute has deprived him of all remedy for the enforcement of his legal title.

Foulke v. Bond 41 *N. J. L.* 527.

See Gatling v. Lane, 22 *N. W.* 453.

Creekmur vs. Creekmur, 75 *Va.* 430.

North P. R. Co. vs. Ely, 25 *Wash* 384.

Title to land under a Federal or State grant may be acquired by adverse possession continued for the statutory period after the grantee acquires the title from the Federal or State Government, and

it is immaterial that the possession shall commence before the title passes.

1 *Cyc.* 1113.

Bicknell v. Comstock, 113 *U. S.* 149; 28 *L. Ed.* 962.

In the case at bar United States patent was issued to the town of Juneau some time prior to the execution of the trustee's deed by the townsite trustee to Pullen et al, and the evidence shows that Waddleton was in possession of the lot in controversy prior to the execution of said trustee's deed.

(2) *That under the pleadings and evidence in this case, the trial court properly instructed the jury to return a verdict for plaintiff for an undivided two-thirds interest in the land in controversy.*

Counsel for defendant assumes a state of facts directly opposite to the issues and evidence in the case and then cites authorities in support of same. In his brief, he states the following proposition, viz:

> "Unless then the plaintiff, Waddleton, showed some sort of title or right of possession of the property, he was not entitled to recover anything from a tenant in common in possession of the entire premises."

But this is not the true premise! We have already shown in this brief that the evidence is, in effect at least, entirely undisputed that the plaintiff had title by adverse possession to the whole of the lot in controversy, and the pleadings and evidence

show that the ouster by defendant was only of a part of said lot, the plaintiff still residing and living thereon. Furthermore that the defendant is not a co-tenant.

The adverse possession of plaintiff vested the fee simple title in him as effectively as if there had been a former conveyance, and as holder of such title so acquired, if ousted from his possession, either by a third person or the former owner or owners, he may maintain an action of ejectment to recover the premises. See 9 R. C. L. Sec. 19;

1 CYC 1135 (B)

Immediately upon defendant ousting plaintiff from possession of part of said lot, plaintiff brought this action in ejectment alleging in his complaint ownership by reason of adverse possession, to which defendant answered denying the allegations of the complaint, excepting as to the possession of plaintiff, and setting up an affirmative defense, wherein it is alleged that the defendant is the owner in fee simple of the whole of said lot and entitled to the possession thereof. Plaintiff in his Reply to said Answer pleads the Statute of Limitations.

Defendant did not plead, defend or justify his entry as tenant in common, or part owner, or on behalf of himself and his co-owners. HE CLAIMED TITLE TO THE WHOLE PROPERTY, NOT ONLY AS AGAINST THE PLAINTIFF, BUT IN ANTAGONISM TO ANY INTEREST WHICH MAY BE CLAIMED BY Mary H. Wilson and Thom

as A. Wilson, the very persons whom he now describes in his brief as his co-tenants.

> If defendant had established title to one-third interest, and was permitted to recover possession of the whole by reason thereof, he would not be estopped to deny the title of the very persons whom he now claims are his co-owners. See King v. Hyatt, 51 Kan. 504.

And the very fact that in this action the defendant did claim to own the interest of Mary H. Wilson and Thomas A. Wilson is sufficient to show that any interest they may claim would be antagonistic to the claim of the defendant.

> Why, then, we ask, should the jury be instructed to return a verdict in favor of defendant for the whole title?

There is no assignment of error based upon the failure of the trial court to instruct the jury "that if they found that defendant was entitled to one-third interest in said lot as a tenant in common, then he was entitled to recover possession of the whole." The error assigned is that the trial court erred in instructing the jury to find in favor of plaintiff for a two-thirds interest. As to whether plaintiff or defendant was entitled to the other one-third was left entirely to the jury to determine, and by their verdict they found in favor of plaintiff and against the defendant.

As hereinbefore stated, the only interest, under

any circumstances, that defendant could be entitled to, is a one-third, and the jury having found he was not entitled to such interest, it necessarily follows that *defendant was not a co-tenant and could not under any view of the law be entitled to possession of the the whole as a co-tenant.*

There is considerable conflict in the law as to whether a co-tenant suing in ejectment is entitled to recover possession of the whole. The reason for this conflict is that the courts of some states look upon the right of possession as the gist of the co-tenant's claim, while the courts of other states regard the title as the main thing to be considered and measure the recovery by the extent of the co-tenant's interest in the property.

See note in 6 L. R. A. (N. S.) 710, 712 and 717.
also note 51 L. R. A. (N. S.) 50.

But in all the cases holding that a co-tenant is entitled to the possession of the whole such co-tenant must represent a better title than the adverse claimant and must establish his title to an aliquot part of the property in dispute.

Dolph v.Barney, 5 *Ore.* 191;
Willians vs. Sutton, 43 *Cal.* 65;
Treat v. Reilly, 35 *Cal.* 129;
Mather vs. Dunn et al, 76 *N. W.* 923;
Le France vs. Richmond, 5 *Sawy*, 601;
Harner vs. Ellis, (*Kan.*) 90 *Pac.* 275.

"The rule that a tenant in common can recover the whole for the benefit of himself and his co-tenants, as against a trespasser, does not apply where

the defendant has clear title as against the co-tenants, by limitation."

Boone v. Knox, 80 *Tex.* 642.

In the case of Gray vs. Givens, 26 Mo. 291, the court says:

> "It often happened, that one tenant in common was barred by limitations, when the other was not and that a title might be acquired by adverse possession. The defendant would prevail against one when he could not against the other. But this would amount to nothing if the plaintiff, not barred and claiming but a fractional interest could recover for the other, *against whom the defendant might have title by lapse of time.*

In 7-R. C. L. 907, referring to the question of one tenant in common being entitled to the possession of the entire estate, it is said:

> "This rule must be limited in its application, however, to those cases where the other cotenants could themselves recover their aliquot parts; and if the rights of some of the co-tenants are barred by the statute of limitations, they could not recover the property and certainly another tenant could not recover for them."

So in this case, it is clear from the evidence that not only is the defendant barred by the statute of limitations, but so also are Mary H. and Thomas A. Wilson, and even had the defendant established an

interest in himself, the fact would still remain from the uncontradicted evidence in this case, that Mary H. and Thomas A. Wilson were barred by the statute of limitations and the defendant could not under any of the authorities recover their interest.

The case of *Williams vs. Coalcreek M. & M. Co.* 6 L. R. A. (N. S.), 711, cited by counsel for defendant, holds that even where a co-tenant does establish his interest, he can recover no more than that interest.

We do not deem it necessary to go further into the question as to whether or not a co-tenant is entitled to recover the whole, for the reason we believe we have fully established that the defendant, having failed to recover the one-third interest, which is the only interest at most he could have any title to, was not and could not be a co-tenant of Mary H. Wilson and Thomas A. Wilson; and defendant having failed to establish any title to the property in controversy and plaintiff having fully established his adverse claim as determined by the verdict of the jury, defendant certainly was not entitled to any instruction for the recovery of the whole or any part of the property in controversy under any interpretation of the law.

(3). *Plaintiff has by his adverse possession acquired fee simple title to said Lot* 6, *Block* 13, *of the town of Juneau, Alaska, and defendant is completely barred by the Statute of Limitations without*

reference to good faith even if the failure to instruct the jury on the question of good faith was assigned as error, which it is not.

Counsel for defendant does not assign as error, nor does he pretend to say that the trial court failed to instruct the jury on the question of good faith, and we submit so far as the Appellate Court is concerned it will be presumed that if such instruction was necessary, the same was given.

As where "good faith" is an essential element it is always a fact to be determined by the jury.

1 CYC 1154.

However, we contend, that the defendant is barred by the Statute of limitations without reference to the good faith of plaintiff, and, in the language of defendant's brief, on page 7, "that plaintiff was entitled to the possession and ownership of the property by limitation."

Sec. 1874, p. 636 of the Compiled Laws of Alaska (being Sec. 1042 of Carter's Alaska Code) provides that "the uninterrupted, adverse, notorious possession of real property under color and claim of title for seven years or more shall be conclusively presumed to give title thereto, except as against the United States."

The foregoing section was passed in the year 1900 and subsequent to the plaintiff going upon the property in controversy, and commencing his adverse possession thereof.

There was no statute of Oregon in 1900, and

there is no statute now, so far as we know similar to the statute above quoted.

Therefore the adverse possession of plaintiff having commenced prior to the passage of the above mentioned statute, the cases from Oregon, under the laws of which state, Alaska was governed prior to the passage of Carter's Alaska Code, should control.

Sec. 838, p. 379 of the Compiled Laws of Alaska (being Sec. 4, p. 146 of Carter's Alaska Code) provides that actions shall be commenced as follows: "Within ten years, actions for the recovery of real property or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it shall appear that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action. * * * ".

This last mentioned section is taken from the Laws of Oregon, October 17, 1878, Hill's Ann. Laws, Sec. 4, and was in force in the Territory of Alaska prior to and at the time the plaintiff commenced his adverse possession of the lot in controversy, as the laws of Oregon were adopted as the laws applicable to Alaska by an Act of Congress entitled, "An Act providing for a civil government for Alaska, approved May 17, 1884, 23 St. L. 47, Chap. 78.

If, however, the two statutes aforesaid were both in force at the time of the commencement of the adverse possession of plaintiff, it would not change the situation, *for the reason that plaintiff is claim-*

ing under the latter section, which is purely a statute of limitation.

In the state of Washington they have somewhat similar statutes to the foregoing (Ballinger's Ann. Code and Statutes, Secs. 4797 and 5503) and in the case of Biggart vs. Evans, 36 Wash. 212; 78 Pac. 925, it was stated that the distinguishing features of the Statutes of ten and seven years limitation in Washington is that, under the latter, the adverse possessor must hold under color of title, and in good faith, while under the former, *these are not essential elements.*

See Moore v. Brownfield (*Wash*) 34 *Pac.* 199;
Hesser v. Siepmann (*Wash.*) 76 *Pac.* 295;
Brodack v. Morbach, et al., 80 *Pac.* 275.
Pettigrew v. Greenshields (*Wash.*) 112 *Pac.* 751;
Dibble v. Bellingham Bay Land Co. 163 *U. S.* 63; 41 *L. Ed.* 72.

It is well settled in Oregon that title by adverse possession may be acquired regardless of the good faith of the claimant if accompanied by even a pretense, commonly known as a claim of title.

See Parker v. Metsger, 12 *Ore.* 407;
Joy v. Stump, 14 *Ore.* 361; 12 *Pac.* 929;
Coventon v. Siefert, 23 *Ore.* 548; 32 *Pac.* 508
Oregon Con. Co. v. Allen Ditch Co. 41 *Ore.*, 209; 69 *Pac.* 445;
Gardner v. Wright (*Ore.*) 91 *Pac.* 286.

"To be an adverse possession it must be an oc-

cupancy under a claim of ownership although it need not be under color of title. *It is sufficient if the party goes upon the land, and declares to the world, by his acts and conduct, that he is the owner of it, and maintains that attitude for the requisite period.*"

Swift v. Mulkey, (*Ore.*) 12 *Pac.* 78.

An adverse possession, open, notorious and accompanied with acts of ownership or a claim of ownership for the statutory period, bars an action to recover land, without reference to the good faith or color of title under which the ownership is claimed. *It is the actual claim of ownership, and not the bona fides, that is the test.*

Smith vs. Roberts, 62 *Ala.* 83.

See Charle vs. Saffold, 13 *Tex.* 94;

Link vs. Bland, 95 *S. W.* 1110;

Fitzgerald vs. Brewester, 31 *Neb.* 51;

Carpenter vs. Coles, 75 *Minn.* 9;

Wilkison vs. Eilers, 114 *Mo.* 245.

If good faith was an essential element, the knowledge by plaintiff that trustee's deed had been executed in favor of the Pullen heirs, and that he, the plaintiff, had been unsuccessful in the contest before the Land Department, does not impute bad faith to his entry and adverse possession.

Iowa R. L. Co. vs. Blumer, 206 *U. S.* 484; 51 *L. Ed.* 1148.

The case of Center vs. Cady, 184 Fed. 605, appealed from the Circuit Court for the Western District of Washington, and cited by counsel in his brief,

is a case involving Sec. 5503 of Ball. Ann. Code of the State of Washington, which provides that "every person in open and notorious possession of lands or tenements under claim and color of title, *made in good faith*, who shall, for seven successive years continue in possession," etc.

This is not a case in point as one of the essential requisites in that case under the seven years statute of limitations of the State of Washington is that the claim of title shall be made *in good faith*, but as has been decided by the Supreme Court of that state *good faith is not an essential element under the ten year statute of limitations.* This case could in no event have any application in the case at bar, for *good faith* is not an essential element under the statutes of limitations in Alaska.

The case of Jasperson vs. Scharnikow, 150 Fed. 571, was appealed from the Circuit Court for the Western District of Washington and is cited by counsel for the defendant in his brief. This also is not a case in point for in that case the evidence *failed to show any claim of right or ownership in the adverse claimant when he went upon the land, and, as stated by the court, his entry was without any pretense of having a right as owner of the property.* A comparison between that case and the case at bar will be sufficient to show the glaring difference as to the facts. In the case at bar there can be no question of doubt as to the plaintiff claiming and asserting his ownership to the land from the time of his entry and

during all of the time for more than ten years thereafter, *and this was found as a question of fact by the jury.*

In conclusion, we reiterate that the following propositions are established by the evidence:

First, That the plaintiff went into possession of the disputed premises claiming ownership thereof and has remained in the actual, exclusive, sole, continuous, uninterrupted, open, hostile and adverse possession thereof for more than ten years, at all times claiming to own the same.

Second, That his entry and claim of ownership were in good faith.

Third, That the only title set up to defeat this adverse possession is a *false deed*, purporting to convey the interest of Mary H. and Thomas A. Wilson, by John G. Heid, attorney in fact, without any authority whatever, and the interest of James H. Pullen, by virtue of a power of attorney executed more than twenty years ago, *since which time the said Pullen gave up the property in controversy in disgust and abandoned it and nothing further has been heard from him, and it is not known whether he is living or dead.*

Good faith on the part of plaintiff was shown by the evidence and submitted to the jury under proper instructions, even though not an essential element in the case. It seems to us that *bad faith*, to say the least, on the part of the defendant, is evidenced by his

attempt to claim any title under the deed from John G. Heid, attorney in fact—this in view of the testimony introduced by defendant himself in his effort to sustain the deed.

We are fully aware that much of this brief is unnecessary, for the evidence itself defeats the contentions made by counsel for defendant and the authorities cited in defendant's brief in the light of the testimony in this case seem to us to make this appeal absurd.

Respectfully submitted,
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